NO. 21,911

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LIBATI LUI UNGA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

RESPONDENT'S BRIEF

CECIL F. POOLE
United States Attorney

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

450 Golden Gate Avenue, Box 36055
San Francisco, California 94102
Telephone 556-7633

Attorneys for Respondent.

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AUTHORITIES CITED

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RESPONDENT'S BRIEF

JURISDICTION

The petition to review final order of deportation is clearly within the jurisdiction of the Court under 8 USC 1105a (Section 106 of the Act).

STATEMENT OF CASE

Petitioner is a native and citizen of Tonga, 44 years of age. He entered the United States at Honolulu, State of Hawaii, March 26, 1963, as a student authorized to remain until March 25, 1964.

On January 15, 1964 he was granted the privilege of voluntary departure on or before February 14, 1964, because he was not attending a Service-approved school and was employed without permission. He made application for status as a permanent resident under Section 245 (8 USC 1255). This was denied and he was given to May 22, 1965 within which to depart. He did not depart. His deportability is conceded.

The Section 245 application was denied in the exercise of discretion. Petitioner appealed and the Board of Immigration Appeals remanded for further consideration in the light of a new regulation (8 CFR 212.8(b)(4)). On further hearing the Special Inquiry Officer again denied the application. Petitioner again appealed, and the Board of Immigration Appeals dismissed the appeal on the ground that the application did not warrant a favorable exercise of discretion. A copy of the Board of Immigration Appeals decision is attached as Attachment I.

QUESTION

Has there been an abuse of discretion?

ARGUMENT

The only thing open for review is the final order of deportation. The Board has exercised its discretion. The failure to determine the question of eligibility is not prejudicial to petitioner.

Silva v. Carter (9 Cir.)
326 F.2d 315,
Cert. den. 377 US 917

Santos and Murillos v. INS (9 Cir.)
375 F.2d 262

Hintopoulos v. Shaughnessy
353 US 72

Jay v. Boyd
351 US 345

Garcia-Castillo v. INS (9 Cir.)
350 F.2d 1

CONCLUSION

The Board of Immigration Appeals having denied the §245 application in the exercise of discretion, review of the decision of the Board of Immigration Appeals and the record fails to disclose

any abuse.

It is respectfully submitted that the petition should be dismissed.

CECIL F. POOLE
United States Attorney

By: _____
CHARLES ELMER COLLETT
Chief Assistant United States Attorney

Attorneys for Respondent

DATED:
November 24, 1967.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

= =

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a copy of the foregoing Respondent's Brief was served upon petitioner by depositing the same in the United States mail at 450 Golden Gate Avenue, San Francisco, California, addressed to Attorneys for Petitioner,

MILTON T. SIMMONS, Esq.
DONALD L. UNGAR, Esq.
517 Washington Street
San Francisco, California 94111

DATED:

November 27, 1967

CHARLES ELMER COLLETT
Chief Assistant United States Attorney

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals

MAY 11 1967

File: A-13550817 - San Francisco

In re: LIHATE LUI UNGA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Donald L. Ungar, Esq.
Phelan, Simmons & Ungar
1210 Mills Tower
San Francisco, Calif. 94104
(Brief filed)

ON BEHALF OF I&N SERVICE: Stephen M. Suffin, Esq.
Trial Attorney
(Brief filed)

CHARGES:

Order: Section 241(a)(2), I&N Act (8 USC 1251 (a)(2)) - Nonimmigrant, remained longer

Lodged: None

APPLICATION: Status as a permanent resident - Section 245, Immigration and Nationality Act; otherwise, voluntary departure

The case comes forward on appeal from the order of the special inquiry officer dated November 22, 1966 denying the respondent's application for status as a permanent resident under Section 245 of the Immigration and Nationality Act, granting voluntary departure in

ATTACHMENT I

lieu of deportation with the further order that if the respondent failed to depart when and as required, he be deported to Tonga on the charge contained in the Order to Show Cause.

The respondent is a native and citizen of Tonga, 44 years old, married, male. His only entry into the United States occurred at the port of Honolulu, Hawaii on March 26, 1963 as a student, authorized to remain here until March 25, 1964. On January 15, 1964, he was granted the privilege of voluntary departure on or before February 14, 1964 because he was not attending a Service-approved school and was employed without permission. On April 22, 1965, his application for status as a permanent resident under Section 245 of the Immigration and Nationality Act was denied and he was given until May 22, 1965 within which to depart from the United States voluntarily. The respondent did not leave and is accordingly deportable on the charge stated in the Order to Show Cause. Deportability is conceded.

In his previous order of March 16, 1966, the special inquiry officer held that an alien, such as the respondent, coming to the United States to operate his own business, which involved only the purchase of old merchandise, such as clothing, household utensils or sewing machines, and shipping them to a foreign country for resale, was not coming to perform skilled or unskilled labor within the meaning of Section 212(a)(14) of the Immigration and Nationality Act and did not need a certification from the Secretary of Labor. However, the special inquiry officer denied the application for permanent resident status under Section 245 of the Immigration and Nationality Act in the exercise of discretion but granted the privilege of voluntary departure. When the case was last before this Board on September 14, 1964, in view of the promulgation of new regulations, which included among aliens not required to obtain a labor certification, those who were to engage in a com-

mercial or agricultural enterprise in which the alien had invested or was actively in the process of investing a substantial amount of capital, 8 CFR 212.8(b)(4), the case was remanded for consideration in light of the new regulation, for additional evidence to establish eligibility for exemption of the labor certification prescribed in Section 212(a)(14) of the Act and for further evidence to determine whether relief was justified as a matter of discretion.

At the reopened hearing, it was developed that the respondent had ceased performing labor (employment as a gas station attendant) and has been engaged in buying and exporting to Tonga used clothing and other items for sale there by his brother. Since February 1966 he has made five shipments at a total cost of $2,553, consisting of $1,974, the cost of the merchandise shipped, $575 for freight and $13 for miscellaneous expenses. Gross proceeds from the first two shipments were $2,228. The respondent estimates a net profit from the five shipments of $1,636. He plans to make larger and more frequent shipments, and expects to do so despite competition from others who have been buying old merchandise for shipment to Tonga, and despite Tonga's limited population of about 60,000. The respondent has $900 in his business account, and there is being held in trust for him by his counsel $1,200 which he borrowed from a bank in San Francisco for the purpose of bringing his wife and seven alien minor children to the United States if he is granted permanent resident status. Applying the new regulation, 8 CFR 212.8(b)(4), the special inquiry officer found that the respondent was not exempt from the labor certification requirement of Section 212(a)(14).

We do not find it necessary to reach the question of a labor certification.1/ The grant of adjustment of status pursuant to Section 245 of the Immigration and

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1/ Matter of Leger, Int. Dec. 1638.

Nationality Act is, by its very terms, discretionary. The Board has the authority to review eligibility for discretionary relief on appeal.2/

The respondent has no close family ties or dependents living in the United States. His wife and seven children are citizens and residents of Tonga. The respondent entered the United States as a student in March 1963. Within six months his attendance at school became very sporadic and thereafter he attended school very little, if at all. On January 15, 1964, he was granted the privilege of departing voluntarily because he was not attending a Service-approved school and was employed without permission. From the evidence of the respondent's meager assets and small potential income, it is extremely doubtful that he would be able to support his wife and seven children in the United States from the profits he makes from his business enterprise. The fact that he may encounter greater difficulty in obtaining an immigrant visa abroad than in obtaining permanent resident status under Section 245 while in the United States is not sufficient reason for exercising discretion in his favor. Under the circumstances, and in the absence of outstanding equities in respondent's favor, the grant of the discretionary relief of permanent resident status pursuant to Section 245 of the Immigration and Nationality Act is not justified.

Counsel has raised in this case, as he has in other cases, the effect of the amendment to Section 245(c) of the Immigration and Nationality Act by the Act of November 2, 1966 (P. L. 89-732, 80 Stat. 1161). We

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2/ Tovar v. Immigration and Naturalization Service, 368 F.2d 1006 (9th Cir. 1966).

have already concluded that the amendment to Section 245(c) created an exception only for those mentioned in Section 245(c), namely, natives of the Western Hemisphere and adjacent islands who had filed applications for adjustment of status before December 1, 1965. It was not meant for others.3/ The appeal will be dismissed.

ORDER: It is ordered that the appeal be and the same is hereby dismissed.

Chairman

3/ Matter of Hoeft, Int. Dec.1723 (April 14, 1967).